In the leading Virginia case of *Macaulay* v. *Dismal Swamp Co.*,[28] it was held that where the land was chiefly valuable for timber, and where the husband had formerly used the timber for the manufacture of shingles (a combination of the last two exceptions above noted), the widow might use it the same way.

A. B. C.

CONSTRUCTION OF THE ELEVENTH AMENDMENT.—The Constitution of the United States provides, Art. 3, sec. 2, that the courts of the United States shall have jurisdiction of all cases between a State and citizens of another State. According to Hamilton in his exposition of the Constitution, the Federalist, it was not meant that any State would be amenable to the suit of an individual without its own consent; but that was exactly the interpretation put upon it by the Supreme Court in *Chisholm* v. *Georgia*.[1] This decision so aroused the advocates of State sovereignty that at the next session of Congress the Eleventh Amendment was passed. This amendment is as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state."

Since this amendment, interference by the Federal courts, as courts of equity, has been sought to enjoin State officers from enforcing State statutes which are thought to be unconstitutional, and for the enforcement of which there is no adequate remedy at law for the party so proceeded against. Such a situation would arise where irreparable injury would result from the enforcement of the statute,[2] or where a multiplicity of suits would result from its enforcement,[3] or where the penalty provided is so severe that no one will dare to violate the act to test its validity.[4] The question whether such a suit is one against the State itself, or the public officers of the State concerned with the enforcement of its laws, the courts have found difficult to answer. Consequently the Supreme Court has been forced to draw many fine distinctions which the lower courts have often misapplied.

The question was first brought to the attention of the Supreme Court in *Osborn* v. *Bank*.[5] A State statute levied a tax on the Bank of the United States and provided that if such tax were not paid

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[28] *Supra.*

[1] 2 Dall. 419.

[2] Rast *v.* Van Deman & Lewis Co., 240 U. S. 342, 60 L. Ed. 679, 36 Sup. Ct. 370, L. R. A. 1917A, 421 (1916); Minneapolis Brewing Co. *v.* McGillivray, 104 Fed. 258 (1903); Michigan Salt Works *v.* Baird, 173 Mich. 655, 139 N. W. 1030 (1913).

[3] City of Hutchinson *v.* Beckham, 118 Fed. 399 (1902); Glucose Refining Co. *v.* City of Chicago, 138 Fed. 209 (1905).

[4] Truax *v.* Raich, 239 U. S. 33, 36 Sup. Ct. 7, L. R. A. 1916D, 545 (1915).

[5] 9 Wheat. 738 (1824).

the auditor of the State should levy the amount on the money of the Bank, the money so seized to be retained as if taken on *fi. fa.* According to the provisions of the act the auditor seized certain funds of the Bank. In an action brought to enjoin the auditor from using or paying out these funds an injunction was granted. Here the auditor was an individual trespasser guilty of a wrong in taking the Bank's funds illegally, and vainly seeking to defend under authority of a void statute. Since an action at law could have been maintained against him in trespass or detinue the State was not a necessary party and hence this was no suit against the State. In this case Mr. Chief Justice Marshall, in the course of his opinion, also established the rule that where jurisdiction depends on the party, it is the party named in the record, and the court cannot go back of this to determine who the real party is. While here the application of this doctrine seems correct, subsequent cases have overruled it.[6] Thus in speaking of the Eleventh Amendment, it was said in the case of *In re Ayers*,[7]

> "* * * it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents, and representatives, *where the State, though not named as such, is, nevertheless the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates.*" (Italics ours.)

So, *Minnesota* v. *Hitchcock*[8] held that when suit was brought against the Secretary of the Interior and Commissioner of the General Land Office to enjoin the sale of certain lands on behalf of the United States, it was a suit against the United States.

On the other hand, where the statute is merely for the good of the public and the State itself is not directly interested, an injunction suit against the officers of the State is not prohibited by the Eleventh Amendment. *Reagan* v. *Farmers Loan, etc., Co.*,[9] was distinguished from *In re Ayers* on this ground. In the Reagan case the facts were that a railroad commission was created to establish intra-state rates, the act creating the commission providing that the attorney general should prosecute for failure to comply with the rates so established. The petitioners, alleging the proposed rates of the commission to be confiscatory and in violation of the Fourteenth Amendment, sought to enjoin, by suit in the Federal Court, the enforcement of the act by the attorney general. In holding that this was not a suit against the State, and therefore properly brought in a Federal Court, it was said by Mr. Justice Brewer:

> "So far from the State being the only real party in interest, and upon whom alone the judgment effectively operates, *it has in a pecuniary sense no interest at all.* * * * There is a sense

[6] Louisiana *v.* Jumel, 107 U. S. 711 (1880); Hagood *v.* Southern, 117 U. S. 52 (1885).
[7] 123 U. S. 443, 506 (1887).
[8] 185 U. S. 373 (1901).
[9] 154 U. S. 362, 390 (1893).

doubtless, in which it may be said that the State is interested in the question, but only in a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; *but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment.*" (Italics ours.)

This rule was affirmed in *Smyth* v. *Ames*,[10] a case very similar in fact to the last. And in *Missouri, etc., Ry. Co.* v. *Missouri R'd, etc., Com'rs*,[11] although the Eleventh Amendment was not involved, it was held that the fact that ancillary proceedings might bring penalties into the treasury of the State did not make the State a party to the suit.

The jurisdiction of the Federal Court in *Reagan* v. *Farmers Loan, etc., Co., supra,* was also attacked on the ground that in enjoining the State officers from enforcing this statute it was preventing these officers in their representative capacity from bringing penal actions in the name of the State. It was contended that since these actions were brought in the name of the State and were of a criminal nature they affected the State in its sovereign capacity. But it was held that since the attorney general had been given a *special duty* of enforcing the statute he was in the same position as an individual wrongdoer who by authority of an unconstitutional act committed a wrong or injury upon the property of another. In comparing this situation to that arising in *Osborn* v. *Bank, supra,* a more recent case [12] said:

"In the case of the interference with property the person enjoined is assuming to act in his capacity as an official of the State, and justification for his interference is claimed by reason of his position as a State official. Such official cannot so justify when acting under an unconstitutional enactment of the legislature. So, where the State official, instead of directly interfering with tangible property, is about to commence suits, * * * he is seeking the same justification from the authority of the State as in the other case."

Fitts v. *McGhee* [13] was distinguished from the preceding cases on the grounds that the officers of the State were under *no duty at all* to enforce the statute. In this case an act, the validity of which was questioned, had been passed fixing certain tolls and providing that any person paying tolls prohibited by the act might recover a penalty therefor. In holding a suit to enjoin the attorney general and *all other persons* from bringing actions under this act to be a suit against the State, it was said:

"In the present case, as we have said, neither of the State officers named held any special relation to the particular statute al-

[10] 169 U. S. 466 (1897).
[11] 183 U. S. 53 (1901).
[12] *Ex Parte* Young, 209 U. S. 123, 167, 28 Sup. Ct. 441, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764 (1907).
[13] 172 U. S. 516, 530 (1899).

leged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the State a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the Governor and the Attorney General, based upon the theory that the former as executive of the State was, in a general sense, charged with the execution of all its laws, and the latter, as Attorney General, might represent the State in litigation involving the enforcement of its statutes."

But the scope of this doctrine was much limited by *Ex parte Young*,[14] holding that where there is a *general* duty on the part of the attorney general to enforce the statute and he is *threatening* to perform this duty, then an injunction suit restraining him from so acting is not a suit against the State. In a lengthy opinion in which all the cases are reviewed, Mr. Justice Peckham said:

"The threat to commence those suits under such circumstances was therefore necessarily held to be equivalent to any other threatened wrong or injury to the property of a plaintiff which had theretofore been held sufficient to authorize the suit against the officer. The being specially charged with the duty to enforce the statute is sufficiently apparent when such duty exists under the general authority of some law, even though such authority is not found in the particular act."

The construction of this Amendment as laid down in these decisions has been strictly followed by the Supreme Court,[15] but the application of it by the District Courts has not always been uniform. Thus, in *Sperry-Hutchinson* v. *Kuhn*,[16] it was held that if the attorney general was not charged with any special duty to enforce the act and was not threatening to enforce it under his general authority, a suit to enjoin him from so acting would be a suit against him in his representative capacity and hence one against the State. But in a rather recent case, *Terrace* v. *Thompson*,[17] a contrary decision was reached. Here a statute prohibited the leasing of land to aliens, providing that any violation of the act would be a misdemeanor and that the land so leased should be forfeited to the State. Complainant, desiring to lease land to an alien, brought an action to enjoin the attorney general from enforcing the statute. The attorney general had no special duty to enforce the act, nor had he threatened to do so, yet it was held that this was not an action against the State.

E. D. H.

[14] *Supra*, 158.
[15] Western Union Telegraph Co. *v.* Andrews, 216 U. S. 165 (1909); Herndon *v.* Chicago, etc., Ry. Co., 218 U. S. 135 (1910).
[16] 212 Fed. 555 (1912).
[17] 274 Fed. 841 (1921).